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SUPREME COURT OF THE UNITED STATES

October Term, 1943

No. 486

■

LESTER FOLLETT, *Appellant*

v.

TOWN OF McCORMICK, SOUTH CAROLINA

■

APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA

APPELLANT'S BRIEF

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APPELLANT'S BRIEF

Opinion Below

The opinion of the Supreme Court of South Carolina is not yet reported. It appears in the record at pages 15 to 20.

Jurisdiction

The judgment affirming conviction of appellant was entered on August 26, 1943. (R. 15, 20) On November 15, 1943, appellant duly applied for appeal to this Court. (R. 20) The application was timely granted pursuant to Section 237 (a) of the Judicial Code [28 U. S. C. 344 (a)].[1]

[1] See also Act of Congress of January 31, 1928, Chapter 14, 45 Stat. 54, and the Act of Congress of April 26, 1928, Chapter 440, 45 Stat. 466, supporting jurisdiction of the Court.

Questions Presented

The *fundamental* question to be determined by this Court is: Does the ordinance in question on its face and as construed and applied to appellant's activity constitute an abridgment and an undue burden by taxation on the liberty of appellant to exercise his right of freedom of press and freedom to worship Almighty God as His minister of the gospel, contrary to the First and Fourteenth Amendments to the United States Constitution?

The *incidental* questions involved are:

1) Did the court below err in holding that the principles announced by this Court in *Murdock* v. *Pennsylvania*, 319 U. S. 105, were not apposite because the activity of a resident minister was involved rather than itinerant evangelists?

2) Did the court below err in holding that the activity of appellant was "commercial" and not "religious" and hence not within the protection of the First and Fourteenth Amendments to the United States Constitution, securing the freedom of press and worship?

3) Did the court below err in holding that the constitutional guaranties of freedom of the press do not extend to protect printing and dissemination of information and opinion for profit or commercially?

Ordinance Questioned

In this case the validity of a certain ordinance of the Town of McCormick, South Carolina, is called into question as being unconstitutionally construed and applied to the facts and circumstances of this case. The questioned ordinance reads:

> "BE IT ORDAINED by the Town Council of the Town of McCormick in council assembled, and by the authority of the same:
>
> "SECTION—. That the following license on business, occupation and professions to be paid by the person or persons carrying on or engaged in such business, occupation or professions within the corporate limits of the Town of McCormick, South Carolina:
>
> "Agents selling books, per day $1.00, per year $15.00."—R. 3-4.

Construction Placed on the Ordinance by the Court Below

The Supreme Court of South Carolina held that the ordinance did not relieve from payment of the occupational license tax, resident ministers of the gospel who obtained their living from the money received during the course of the distribution of "religious books". Said the court: "It will hardly be contended that any other minister may make his living by the sale of books and, should he engage in his occupation in the Town of McCormick, not be subject to the moderate license of $15.00 per year prescribed by the ordinance under attack." (R. 16) It was found that the book entitled "Children", being distributed by appellant, was a "religious book" and "so we conclude without difficulty that its publication and distribution come within the meaning of the words 'exercise of religion', as they are used in the constitution". (R. 17) But qualifying this to some extent, the court said: ". . . we think the sales proven

were more commercial than religious. The license was required for the selling of books, not for the spreading of religion." R. 19.

History and Facts Showing Questions Presented

HISTORY

The appellant was charged by complaint with a violation of the ordinance of the Town of McCormick hereinbefore mentioned. Upon his plea of "not guilty", he was brought to trial before a jury on March 21, 1942, in the Mayor's Court of the said Town of McCormick. He was found guilty and sentenced to pay a fine of fifty dollars or serve twenty days in jail. (R. 6) He appealed from this judgment and sentence and his case was thereafter heard in the McCormick County Court of General Sessions. On November 2, 1942, the County Court affirmed the conviction. (R. 12) Appellant timely filed his appeal to the Supreme Court of South Carolina and by way of a Bill of Exceptions raised objections to this judgment on the grounds that it was in violation of the First and Fourteenth Amendments to the Federal Constitution in that it deprived him of his rights of freedom of press and freedom to worship Almighty God as His minister. R. 13-14.

FACTS

Lester Follett is one of Jehovah's witnesses, and as such is a duly ordained minister of the gospel. He has consecrated his life to the publication and preaching of the gospel to mankind. (R. 1, 2) Appellant at the time in question was a resident of the Town of McCormick, South Carolina, being assigned to work there by the Watchtower Bible and Tract Society of Brooklyn, New York. (R. 2) This society, as established by the evidence, is a charitable, non-profit corporation organized under the Membership Corporations Law of the State of New York, and is incorpo-

rated to publish Bibles and Bible literature, and to appoint, ordain and maintain ministers of the gospel. R. 1, 2.

The record shows that the benevolent publishing society regularly sent appellant supplies of Bibles and Bible literature, for which he made periodic remittances. (R. 4) Among the literature thus sent was the book entitled "Children". This book was received in evidence and accompanies the Record to this Court as an original exhibit. The book contains instructions for all who would be the children and subjects of the great Lord and King, Christ Jesus. It does not purport to be a book for children only, but is for the parents and children as well. It shows how the parents can bring up the children in the right way and how the children and their parents can at all times be of mutual benefit to each other in attaining the blessings of everlasting life and happiness. The book is designed to bring joy to the people now by setting out the great truths in the Bible, which truths make the immediate future appear very bright. These truths, the book explains, are published to enable the people to understand how they may become children of the Higher Powers, Almighty God and Christ Jesus, and how they may dwell in joy under Their righteous government forever. "Children" shows that God gave His Word centuries ago that in His due time He would set up His righteous rule over the earth and that then the people would rejoice. It points out that all the Bible testimony and physical facts show that the rule of wickedness is about to come to a complete end, and that such will be followed immediately by the rule of righteousness. The book explains from the Bible how and when that government will come into full control, and what must be done by all persons who love truth and righteousness to obtain the blessings of such righteous rule. R. 3.

It appears that prior to his arrest appellant was distributing this book to the people in the Town of

McCormick by calling at their homes. (R. 2) During the course of his visits, he called at the home of Flavores Cade. (R. 1) He presented to this lady a printed card explaining the purpose of his visit. The card reads:

> "TODAY many are in perplexity as to what to do to protect and safeguard the interests of themselves and their children. The remedy for the present unhappy condition is the rule of the earth by righteous powers. God has made it possible to now learn just how and when such righteous rule will come into full control.
>
> "The great and comforting truths in the Bible are set forth in the book entitled CHILDREN. It contains instruction for all who would be children and subjects of the great Lord and King Christ Jesus. It is not religious, but fills the sincere heart with contentment and hope. It is not a child's book, but is for adults and children as well. Here is a copy for you, and you may contribute twenty-five cents to help publish more like books.
>
> "Read CHILDREN, rejoice and live." R. 3.

The witness said that she read the card, gave appellant twenty-five cents and he gave her the book "Children".

Explaining his activity in this connection, the substance of appellant's testimony appearing in the record reads:

> "My name is Lester Follett. I live in McCormick, South Carolina. I am a regular ordained minister and fully consecrated to do the will of Almighty God as set forth in the following texts: 'Ye are my witnesses, saith Jehovah, that I am God.' (Isa. 43:10-12) 'The spirit of the Lord God is upon me because the Lord hath anointed me to preach good tidings unto the meek, he hath sent me to bind up the brokenhearted, to proclaim liberty to the captives and the opening of

the prison to them that are bound, to proclaim the acceptable year of the Lord and the day of vengeance of our God, to comfort all that mourn.' (Isa. 61:1, 2) 'And this gospel of the Kingdom shall be preached in all the world for a witness unto all nations and then shall the end come.' (Matt. 24:14) As the apostles were sent forth by the Lord Jesus Christ so I am sent forth. They went from house to house preaching the gospel orally; I am doing so by going from house to house presenting the gospel of the Kingdom in printed form. I am called to follow in the footsteps of Jesus; for 'even hereunto were ye called; for Christ also suffered, leaving us an example, that ye should follow in his steps.' (1 Pet. 2:21) I here offer in evidence a card containing a certificate of ordination, also a testimony. I was not selling. I was placing the books on a contribution." R. 4-5.

The certificate of ordination received in evidence sets out further details of appellant's activity and his Scriptural authority to preach the gospel. It also identifies him as one of Jehovah's witnesses and an authorized representative of the Watchtower Bible and Tract Society. The pertinent portions of this certificate appear in the Record at pages 2-3.

Shortly after appellant placed the book with the complaining witness, the police placed him under arrest on the ground that he was peddling books without having obtained a license under the ordinance in question.

Appellant said that he did not have any secular occupation, but declared that he devoted his entire time to the preaching of the gospel by distributing Watchtower literature from house to house and upon the streets and talking to the people in their homes. (R. 4) He did not receive a salary or commission from the distribution of the literature. (R. 5) The record shows that "Bibles, books, booklets, and magazines are offered free to those that

are poor" at the personal expense of appellant. (R. 2) Appellant was thus dependent for his living upon the good-will contributions which he received from persons desiring to further the charitable cause in which he was engaged. The specified contribution of twenty-five cents for the book "Children" is "accepted for the publishing of other literature so that the Word of the Lord may have greater circulation in all this world for a witness, giving other people the opportunity of learning of God's gracious provision for them". R. 2.

How Federal Questions Raised

At the close of all the evidence in the Mayor's Court for the Town of McCormick, appellant filed a motion for a directed verdict on the grounds, *inter alia,* "That the Ordinance requiring the defendant to secure a license is in direct violation of the 14th Amendment of the Constitution of the United States in that it restricts the freedom of speech, freedom of the press and the freedom of worship of Almighty God." (R. 4) This motion was overruled and the County Court of General Sessions affirmed this ruling on appeal.

In the Supreme Court of South Carolina, by way of a Bill of Exceptions, appellant attacked the ordinance on the grounds that as construed and applied it abridged and denied his rights of freedom of press and of worship of Almighty God in that it was an undue burden thereon, contrary to the First and Fourteenth Amendments to the United States Constitution. R. 13-14.

The Supreme Court of South Carolina considered this exception to the ruling of the courts below it, and overruled appellant's contention. It held: "Thus we find no violation of the First Amendment (or the Fourteenth) to the Federal Constitution in the application of the ordinance to appellant and his book selling. It is not, in our opinion, unconstitutional as so applied." R. 20.

Specification of Errors to be Urged

Appellant intends to urge that the Supreme Court of South Carolina erred in failing to hold that the McCormick County Court of General Sessions and the Mayor's Court of the Town of McCormick, committed reversible error in overruling appellant's motion for a directed verdict filed at the conclusion of the evidence in the said Mayor's Court.

Preliminary Remarks

The court below has avoided the controlling precedent announced by this Court in the series of cases commonly styled *Murdock* v. *Pennsylvania*, 319 U. S. 105,[2] by adopting a different view of the facts of record. The South Carolina Supreme Court declared:

> "It is certainly not a distortion of the facts (see 63 S. Ct. at page 874) in this case to find, which we do, and hold, as did the lower Courts, that appellant's occupation was that of selling books and not that of colporteur." R. 19.

However, in approaching the federal question, this Court will first make an independent analysis of the facts, as it did in the *Murdock* cases.[3] In this connection it may be fairly observed that the only factual distinction mentioned in the opinion of the court below is that the appellant is a

[2] *Jones* v. *Opelika, Bowden and Sanders* v. *Ft. Smith, Jobin* v. *Arizona*, 316 U. S. 584, 319 U. S. 103; *Murdock, Perisich, Mowder, Seders, Lamborn, Maltezos, Anastasia Tzanes and Ellaine Tzanes* v. *Commonwealth*, 319 U. S. 105.

[3] See also *Truax* v. *Corrigan*, 257 U. S. 312, 325; *Sterling* v. *Constantin*, 287 U. S. 378, 398, and cases there cited.

"resident of a town, the ordinance of which is involved" rather than an "itinerant colporteur". (R. 18-19) The record in the *Murdock* cases, however, does not support this distinction. While it is true that the opinion of this Court speaks of "the liberties of itinerant evangelists" the text and reasoning leading up to this statement make it clear that the liberties restored to "their high constitutional position" in that case are not those possessed exclusively by those persons described by the court below as "passing or traveling about the country; going or preaching on a circuit; wandering". (R. 19) On the records in the *Murdock* cases this Court would not have been justified in so limiting the scope of the opinion.

The decision of this Court in the *Murdock* cases culminated a long series of controversies arising under the First and Fourteenth Amendments to the Federal Constitution over the misapplication of commercial license-tax laws and ordinances to the activities of Jehovah's witnesses. The broad constitutional guaranties have been found to cover the activity. It will not be necessary, therefore, to present further argument on this question. It seems plain that the constitutional issues in this case are governed by the pronouncements in the *Murdock* cases and can be summarily disposed of without further consideration.

If, however, the Court feels obligated to follow the findings of fact made by the court below, and assumes that the activity here is not religious but commercial, it will then become necessary to consider a further serious and substantial question:

Does the *commercial sale* of literature for profit push its distribution outside the protection of the First and Fourteenth Amendments to the Constitution, when such literature contains information and opinion?

Points for Argument

ONE

The ordinance is void and unconstitutional as construed and applied to appellant's activity because it abridges and unduly burdens by taxation the exercise by appellant of his right of freedom to worship ALMIGHTY GOD as His minister, contrary to the First and Fourteenth Amendments to the United States Constitution.

TWO

The ordinance is void and unconstitutional on its face and as construed and applied to appellant's activity because it bridges and unduly burdens by taxation the exercise by appellant of his right of freedom of press, contrary to the First and Fourteenth Amendments to the United States Constitution.

ARGUMENT

ONE

The ordinance is void and unconstitutional as construed and applied to appellant's activity because it abridges and unduly burdens by taxation the exercise by appellant of his right of freedom to worship ALMIGHTY GOD as His minister, contrary to the First and Fourteenth Amendments to the United States Constitution.

The record conclusively shows that appellant is a minister and devotes his entire time to the preaching of the gospel by means of the distribution of Bibles and Bible literature. Received in evidence was a copy of the book "Children" distributed by appellant, the distribution of which the court below found to be "within the meaning of the words 'exercise of religion', as they are used in the Constitution". (R. 17) With this assertion, appellant takes no issue. Upon these undisputed facts it is manifest that appellant was exercising his FREEDOM TO WORSHIP ALMIGHTY GOD, and the imposition of a license tax as a condition precedent to the exercise of that right infringes and unduly burdens this liberty set apart in a "preferred position" by the First Amendment.

So clearly and unmistakably has the activity here involved been identified by this Court as an exercise of the right of *Freedom of Worship* guaranteed under the First Amendment, that further discussion of the matter is unjustified. For this reason, we rest our contention, that the application of the ordinance to the activity of appellant violates his freedom to worship, directly upon the holding of this Court in *Cantwell* v. *Connecticut,* 310 U. S. 296; *Largent* v. *Texas,* 318 U. S. 418; *Jamison* v. *Texas,* 318 U. S. 413; and *Murdock* v. *Pennsylvania,* 319 U. S. 105.

If the Court finds that there has been an unconstitutional

violation of appellant's freedom to worship, then it will not be necessary to consider the next point.

TWO

The ordinance is void and unconstitutional on its face and as construed and applied to appellant's activity because it bridges and unduly burdens by taxation the exercise by appellant of his right of freedom of press, contrary to the First and Fourteenth Amendments to the United States Constitution.

Far-sighted American statesmen who shared in adopting the Bill of Rights were well aware of the tremendous educational, political, religious and social power inherent in the public press. They had observed the thoughtful writings of a few men, publishing among the people in crude leaflets or newspapers, shape the destiny of the new government, and they were convinced that if the new republic was to remain a government of the people, by the people, and for the people, this great power of the press must be secured inviolate. To do this, the sovereign American people adopted the First Amendment, forbidding Congress to enact any law abridging the freedom of the press. With the later adoption of the Fourteenth Amendment, this prohibition was extended to the several states.

Today the labored thumping of the few crude hand-presses of pre-Revolutionary War days has given way to the efficient hum of thousands of modern high-speed power presses. The local subjects of discussion of those times have been replaced by news and comment world-wide in scope. Haphazard distribution of a few papers is now dwarfed by modern circulation lists mounting up into millions, made possible by a labyrinth of news-conveying agencies and fast transportation facilities. No more is the

press merely a handy instrument for an enterprising few to express publicly their views and opinions. A tremendous commercial industry has sprung up, ranking among the nation's greatest profit-making ventures. Moreover, political parties, labor unions, social and other groups publish millions of tons of material annually in attempting to persuade their fellows to a particular point of view. In short, the importance and service of the public press to the American people has multiplied times beyond comprehension.

In the midst of all this expansion, the guaranty of the freedom of the press expressed in the First Amendment has remained the same. It could not become more absolute, nor did it lose any of its protective powers. Justice Brewer ably characterized the permanency of the Constitution: "the Constitution is a written instrument. As such its meaning does not alter. That which is meant when adopted it means now."[4] Chief Justice Taney believed that in its present form it speaks not only in the same words but with the same meaning and intent as when it came from the hands of its framers.[5] It becomes important, then, to determine what the framers of the Constitution intended to protect when they declared that "Congress shall make no law . . . abridging the freedom . . . of the press." A determination of this question requires an examination of the history and circumstances which antedated and attended the adoption of this clause. The history is a long one, but for the present purpose it may be greatly abbreviated.

Very soon after the introduction of the printing press into England by William Caxton, in 1476, the Crown assumed complete control of the press. Henry VIII did so by authority of his kingly prerogative and the issuance of Letters granting a monopoly of the privilege of printing and distributing and selling books. Under Mary, control

[4] *South Carolina* v. *United States*, 199 U. S. 437, 448 (1905).

[5] *Scott* v. *Sanford*, 16 How. 393, 426 (1856). See also *Truax* v *Corrigan*, 257 U. S. 312, 338.

of printing was maintained by limiting such right to the Stationers' Company which was founded by royal charter in 1557. The number of presses was limited, all publications were subject to previous inspection, and the seat of regulation was in the Court of the Star Chamber, which had been granted the power of general censorship. Both the Tudors and the Stuarts resorted to this court for the suppression of seditious libels.

Under Elizabeth, the number of printers was limited to twenty, no one could print except under royal patent, and no book could be printed except in London, Oxford or Cambridge. During the reign of Elizabeth, prosecutions for seditious libel continued, and in 1586 the Star Chamber published stringent ordinances for the regulation of the press, again restricting the presses to London, Oxford and Cambridge. Under these ordinances no one was permitted to print anything until it had been "seen and allowed" by the archbishop of Canterbury or the bishop of London —except the queen's printer or the law printers, who were licensed by the chief justice and the chief baron. The Stationers' Company was authorized to search houses and shops, to destroy all books printed in violation of the ordinance, and also to destroy all unlicensed presses.

The early Stuarts, James I and Charles I, claimed all the royal prerogatives of their predecessors. Prior to 1637, the number of unlicensed printers had become so great that the Star Chamber decreed that all printed books must be submitted for license and must be registered by the Stationers' Company before publication, under penalty of forfeiture of the presses. Law books continued to be licensed by the chief justice or the chief baron of the Exchequer, books of history and politics by the secretaries of State, books of heraldry by the earl marshal, and all others by the archbishop of Canterbury and the bishop of London. Only twenty master printers were permitted, and no one could have more than three presses. Prosecu-

tions for sedition and seditious libel continued to be brought in the Court of Star Chamber. One of the most notorious was the prosecution of Prynne, who published a work attacking the theater, hunting, public festivals, etc. He was sentenced to stand twice in the pillory, to lose both ears, to pay a fine of five thousand pounds, and to be imprisoned for life.

Although the Court of the Star Chamber was abolished by Act of Parliament in 1641 and restrictions upon freedom of the press disappeared temporarily, the Long Parliament, in June 1643, re-established regulation and licensing of printing; it declared that no order of either house of Parliament should be printed except by their express consent and that no book or pamphlet whatsoever should be printed unless it had been first licensed and entered in the register of the Stationers' Company. The latter was again authorized to search for unlicensed presses and books and to destroy them, to arrest authors and printers and to inflict punishment upon them. It was the passage of this licensing act of 1643 that inspired John Milton to write his "Areopagitica", which was itself written and published in violation of the license statute. The Licensing Act was repealed in 1649 and for a short time even the licensed press was suppressed by Parliament, but the statute was re-enacted in 1650. In 1655 Cromwell suppressed all publications except two official publications conducted by Nedham, who continued to control the press until his death. In 1659, General Monk, after Cromwell's death, encouraged Henry Muddieman to begin the publication of a paper called "Parliamentary Intelligencia" and in 1660 the Council of State suppressed the two papers conducted by Nedham. The Licensing Act was re-enacted in 1662 and was in substance the same as the Star Chamber order of 1637. All books or pamphlets had to be entered with the Stationers' Company; the master printers were still limited to twenty, and books could be printed only in

London, York, or at the universities. The Act was in effect for two years and was renewed from time to time until 1679. It was again renewed in 1685 and remained in effect until 1695. Although during this period there were numerous prosecutions for seditious libel, the publication of papers, tracts, leaflets, etc., increased enormously.

Under James II, a large number of printers, in spite of the Licensing Act, carried on their art in the garrets and other secret places of London. During his reign, the Licensing Act was renewed and was enforced in a particularly tyrannical manner except against the Jacobite Press, which was permitted to publish articles favorable to the King.

Under William and Mary, the Licensing Act was again renewed. When the last renewal expired in 1695, the Committee of the House, which had the Act under consideration, recommended a further renewal, but when submitted to a vote, the report of the committee was defeated.

About this time daily newspapers appeared and criticism of the House of Commons became so violent that, at the suggestion of Queen Anne, in 1712, the House resorted to a new method of restricting the freedom of the press. It enacted a stamp tax on newspapers and a tax on advertising. For nearly a century and a half thereafter there was constant oppression by levy and collection of these taxes. These taxes were one of the chief causes for unrest among the American Colonists and were commonly called "Taxes on Knowledge". Their purpose was to curtail the circulation of cheap newspapers among the masses of the people, and in this they were actually successful to a certain extent although papers on which the tax had not been paid continued to be printed in violation of the law. From time to time the amount of the "stamp tax" was increased in order to restrict the circulation of cheap newspapers. Progressive increases were enacted in 1756, 1789, 1798, 1804, and 1814. In 1836,

the tax was reduced for the first time, but a heavy duty was levied on the paper material itself. The direct result of these taxes was to make the printing of newspapers costly and to restrict their circulation. The advertisement tax was reduced in 1833, and abolished in 1853. The "stamp tax" was finally abolished in England in 1855, and the duty on paper was repealed in 1861.

Prior to adoption of the Constitution of the United States, not only did the British Parliament impose stamp taxes on newspapers in the colonies but some of the colonies themselves established such taxes. Massachusetts imposed a stamp tax on newspapers during the years from 1755 to 1757. New York imposed such a tax from 1757 to 1760. In 1765 the British Parliament imposed a tax on all colonial newspapers of from a half penny to a penny according to the size of the newspaper, and a tax of two shillings on every advertisement. This tax raised a storm of protest in the colonies, who cried out against these taxes as "taxation without representation".

In 1785 the Massachusetts legislature imposed a stamp tax on all newspapers and magazines, and the following year an advertisement tax was imposed. Both taxes met with violent opposition. The former was repealed in 1786, the latter in 1788.

It is significant to note that these laws made no distinction between commercial publishing and non-commercial publishing. Both were restricted alike. The so-called "advertisement tax" levied against *commercial advertisement* was hated by the freedom-loving populace as much as the censorship of publications containing information and opinion. In *Grosjean* v. *American Press Co.*, 297 U. S. 233, 248-249, after briefly reviewing the history of the struggle for freedom of the press, this Court held:

> "The framers of the First Amendment were familiar with the English struggle, which then had continued for nearly eighty years and was destined to go on

for another sixty-five years, at the end of which time it culminated in a lasting abandonment of the obnoxious taxés. The framers were likewise familiar with the then recent Massachusetts episode; and while that occurrence did much to bring about the adoption of the amendment (see *Pennsylvania and the Federal Constitution,* 1888, p. 181), the predominant influence must have come from the English experience. . . .

"In the light of all that has now been said, it is evident that the restricted rules of the English law in respect of the freedom of the press in force when the Constitution was adopted were never accepted by the American colonists, and that by the First Amendment it was meant to preclude the national government, and by the Fourteenth Amendment to preclude the states, from adopting any form of previous restraint upon printed publications, or their circulation, including that which had theretofore been effected by these two well-known and odious methods."[6]

This correct statement of the law is in direct conflict with the holding of the Supreme Court of South Carolina, where it is said, "It seems, and is, a very far cry from the import of the foregoing clause [of the First Amendment] to the occupational license ordinance in question". R. 17.

[6] In *Commonwealth* v. *Reid,* 144 Pa. S. C. 569, 574, 20 A. 2d 841, 843, President Judge Keller, speaking for the Superior Court, said: "The historical reference to 'pamphlets' in that [*Lovell* v. *Griffin,* 303 U. S. 444] opinion and in other opinions of that Court [*Schneider* v. *State,* 308 U. S. 147, 164; *Thornhill* v. *Alabama,* 310 U. S. 88, 97; *Grosjean* v. *American Press Co.,* 297 U. S. 233, 245-250, etc.) is not limited to 'pamphlets' which are distributed without cost. Every student of history knows that the 'pamphlets' referred to by Chief Justice Hughes in his opinion and by Mr. Justice Sutherland in the *Grosjean* case, were not for the most part circulated *gratis,* but were distributed to subscribers or sold." See also *Hannan* v. *Haverhill,* 120 F. 2d 87, 88-89; *Blue Island* v. *Kozul,* 379 Ill. 511, 41 N. E. 2d 515; and *Vermont* v. *Greaves,* 112 Vt. 222, 22 A. 2d 487, involving Jehovah's witnesses, wherein the right of *sale* was found to be within the constitutional protection.

For dissenting Justices in *Murdock* v. *Pennsylvania*, supra, at pages 120 to 130, inclusive, Mr. Justice Reed, argues that the advocates for adoption of the Bill of Rights did not desire to exempt press activity from taxation, and further that the framers of the First Amendment did not contemplate a prohibition against press taxation. This conclusion is not only unwarranted by history, but is also contrary to the facts. During the struggle for ratification, Richard Henry Lee, speaking for those demanding a *Bill of Rights* amendment to the newly adopted Constitution, declared that while Congress had no delegated power to interfere with the freedom of the press, it did have a delegated power to tax and might, therefore, lay a tax on printing so burdensome and discriminatory as to destroy a free press.[7] This clearly shows that the type of abridgment here sought to be sustained is the very evil anathematized by proponents of the Bill of Rights in terms of the First Amendment. This should persuade the Justices dissenting in the *Murdock* cases to reconsider their views expressed concerning the intent of the framers of the First Amendment and the proper construction to be given the amendment concerning freedom of press.

The license tax imposed upon appellant by the application of the ordinance is precisely the kind of tax that the people of this country rejected with the adoption of the Bill of Rights. The tyrannical theory of "law" that permitted application and enforcement of such interferences with the press was the heavy yoke that the early Americans succeeded in throwing off during the Revolutionary War. It was this type of burden and restriction upon the press that this Court unanimously struck down in the *Grosjean* case. That case cannot be distinguished

[7] The substance of this statement appears in a public letter written by Richard Henry Lee, dated October 12, 1787, included in *The Federalist and Other Constitutional Papers*, E. H. Scott, published by Albert, Scott and Company, 1894, pp. 872-873.

in principle from the controversy at bar, for the opinion, at page 244, clearly declares:

> "The tax imposed is designated a 'license tax for the privilege of engaging in such business'—that is to say, the business of selling, or making any charge for, advertising. As applied to appellees, it is a tax of two percent on the gross receipts derived from advertisements carried in their newspapers when, and only when, the newspapers of each enjoy a circulation of more than 20,000 copies per week. It thus operates as a restraint in a double sense. First, its effect is to curtail the amount of revenue realized from advertising, and, second, its direct tendency is to restrict circulation. This is plain enough when we consider that, if it were increased to a high degree, as it could be if valid (*Magnano Co.* v. *Hamilton*, 292 U. S. 40, 45, and cases cited), it well might result in destroying both advertising and circulation."

and at page 250:

> "It is not intended by anything we have said to suggest that the owners of newspapers are immune from any of the ordinary forms of taxation for support of the government. But this is not an ordinary form of tax, but one single in kind, with a long history of hostile misuse against the freedom of the press."

On the basis of this Court's decision in the *Grosjean* case, the Supreme Court of Florida on November 23, 1943, invalidated a similar license tax graduated on the basis of circulation of commercial newspapers. *City of Tampa* v. *Tampa Times Co.*, —Fla.—, 15 S. 2d 612, 12 LW 2310.

The tax imposed by the ordinance here strikes directly at circulation of printed publications. It is not one of the "ordinary forms of taxation" despite its simple appearance. The fixed tax is laid and collected upon the privilege of

distributing or selling books without reference to the scope of the activities of the distributor or his realized revenue. Neither is it a nominal fee imposed as a regulatory measure to defray the expenses of policing the activities in question. It is a flat license tax levied and collected as a condition to the *exercise* of rights guaranteed by the First Amendment. Its direct tendency is to throttle and restrain *in advance* the EXERCISE of the constitutional right. So recently and clearly did this Court settle unconstitutionality of such a flat license tax demanded as a condition precedent to *exercise* of a right guaranteed by the First Amendment (*Murdock* v. *Pennsylvania*, 319 U. S. 105, 108, 111-115), that it is unnecessary to indulge in further analysis of the matter.

It cannot be argued that localized peripatetic *selling* of didactic books is not a right secured under the First Amendment. From what has just been said concerning the history of the adoption of the amendment, it is plain that ALL "printed" (recorded) matter of public concern was included in the word *"press"*.

Nothing is said in the amendment itself about protecting only publications containing information and opinion and circulated without charge. To read such a restriction into the amendment would result in the immediate destruction of the public PRESS as it exists today.

If a Massachusetts tax upon *commercial advertising* led, to some extent at least, to adoption of the First Amendment, and if a Louisiana tax upon *commercial advertising* justified the exercise of the protective powers of the amendment, then by greater force of reason a flat tax upon the distribution of a book containing no commercial advertising but devoted exclusively to an explanation of Bible prophecies concerning God's Kingdom outrages one of the most cherished and essential rights and privileges of Americans. It cannot stand.

To those who have closely watched the recent trend

of the decisions of this Court in dealing with freedom of the press, there has been an alarming line of *dictum* running through the opinions. In *Schneider* v. *State*, 308 U. S. 147, 165, *Jamison* v. *Texas*, 318 U. S. 413, 417, and *Murdock* v. *Pennsylvania*, 319 U. S. 105, 109-110, the Court specifically disclaimed application of the doctrines in favor of freedom of the press to cases where there was "commercial soliciting or canvassing". The Court went even further in *Valentine* v. *Chrestensen*, 316 U. S. 52, 54, and ruled that a municipality could absolutely prohibit distribution of a leaflet containing *both* (1) information and opinion AND (2) "purely commercial advertising", which *advertisement* was the primary motive of the circulation. Thus it appears that there is a double restriction: First, "commercial" publications do not enjoy the protection of the First Amendment, and, second, non-commercial publications distributed by commercial methods are likewise unprotected.[8]

It should be noted here, however, that the *Chrestensen* case and dictum in the other cases mentioned are not in point. Here the record is conclusive as to the non-commercial "religious" nature of the publications being distributed. None of the literature contained a single line of advertising material. But even so, this Court has held that advertisements of "religious" books are protected. *Jamison* v. *Texas*, 318 U. S. 413, 417. The court below, however, extends the principle announced in the *Chrestensen* case far beyond the limits of its intended application, relying on the dictum of this Court in the *Murdock* cases, wherein it was stated, "Situations will arise where it will be difficult to determine whether a particular activity is religious or purely commercial. The distinction is vital at times. . . . *Valentine* v. *Chrestensen*, 316 U. S. 52, 55." The application of this doctrine to this case justifies a brief discussion of the constitutional soundness of the theory.

[8] Cf. *Jones* v. *Opelika*, 316 U. S. 584, 596-598.

Under the double restriction on freedom of the 'commercial press', there is only one type of publication left to be distributed under the protection of the Constitution. Applying the doctrine equitably to all publications that are either commercial or are distributed in a commercial manner, all newspapers, magazines and other familiar periodicals containing vital information and opinion with advertisements, will be found to survive and exist only at the pleasure of the government, without constitutional FREE PRESS protection, while only non-profit, non-commercial publications containing "information and opinion" exclusively would enjoy the protection, but, even then, the distributors would carefully have to avoid all appearance of "commercial aspirations". It is safe to say that in a very short while, if this Court's dictum were extended with the doctrine announced in the *Chrestensen* case, conditions would be little better than they were in the days of Queen Elizabeth.

It seems absurd to seriously consider these possible consequences, but it is alarming to consider how very near this Court has come to sustaining the legal justification for such a condition.

The only difference between the condemned LEAFLET in the *Chrestensen* case and each copy of any issue of any large metropolitan newspaper is the size and number of sheets delivered by the ultimate distributor, whether he be an ambulating vendor or the custodian of a newsstand. Often some such papers have as much as seventy percent of the entire space devoted to advertisement of a commercial nature. Rural newspapers are no exception. Advertising of a commercial nature is the chief means of revenue for the newspapers. In *Grosjean* v. *American Press Co.*, supra, this Court invoked the protection of the First Amendment specifically in behalf of *commercial advertising* carried by the newspapers.

Unless the *Grosjean* case is viewed as reversed, it is

difficult to reconcile this Court's dictum in the many cases involving Jehovah's witnesses and the decision in the *Chrestensen* case, on the one hand, with the *Grosjean* case, on the other; for the holdings are at odds.

Furthermore it is hard to understand how this Court can be so clear as it states itself to be in the *Chrestensen* case with respect to "purely commercial advertising" when it has so strongly supported the protection of advertising of labor matters and labor controversies which constitute only one element of commerce. In the one instance "services" are SOLD (by the laborers) while in the other, such as in the *Chrestensen* case, other material values are SOLD, or in the case of a merchant it is goods that are to be sold.

Reason dictates that *politics, commerce* and *religion* stand on the same level under the First Amendment. One does not have a superior right over the other to advertise for its own benefit.

It is noteworthy to observe that the Supreme Court of South Carolina overruled its own precedent established in July, 1941, in the case of *The State* v. *Thomas Meredith*, 197 S. C. 351, 15 S. E. 2d 678. This Court in the *Murdock* opinion cited that *Meredith* case as authority for the proposition that the activity of Jehovah's witnesses in distributing literature did not constitute a commercial rather than a "religious" venture. This Court agreed with the finding and conclusion of the South Carolina Supreme Court that: ". . . the 'sale' of the book by defendant was merely collateral to the main purpose in which he was engaged, which was to preach and teach the tenets of his religion." In the *Meredith* case, the court below says that it found no *profit motive* involved, but here there was such a motive, and it was that *motive* that sustained the application of the tax. The court below hangs this proposition on the only peg left sticking out of the *Murdock, Jamison* and *Schneider* opinions.

This merely illustrates how easy it becomes to side-

track the First Amendment by the simple expedient of dropping or placing hairline distinctions in the path of liberty, thereby shunting the activity out of the groove of non-commercial enterprise into the allegedly "unprotected" rut of commercialism. The freedoms guaranteed by the amendment are too fundamental and vitally necessary to the success of constitutional democratic government to be based on such a flimsy foundation as would allow the rights to exist only where they do not partake of any "commercial" characteristics. There are almost no undertakings or ventures that could not in some way be viewed as partaking of *commercialism*. "Facts of record" are too easily distorted by courts to permit this destructive distinction to stand. If this alien precept of law were affirmed, then a way would exist to censor, license and suppress the public press.

Although there is but a small license fee involved here, let not the implications it carries be underestimated. If the municipality has the power to levy a tax on this activity because the JUDICIARY has *falsely* labeled it "commercial", then the LEGISLATURE (state *and national*) has the power to regulate, censor and prohibit it altogether because "commercial", as was held—*wrongly*, we submit—in the *Chrestensen* case. The activity which it is alleged brought appellant within the reach of the ordinance is the same activity that this Court brought within the protection of the First Amendment in *Lovell* v. *Griffin*, 303 U. S. 444; *Schneider* v. *State*, 308 U. S. 147; *Cantwell* v. *Connecticut*, 310 U. S. 296; *Jamison* v. *Texas*, 318 U. S. 413; *Largent* v. *Texas*, 318 U. S. 418; *Taylor* v. *Mississippi*, 319 U. S. 583; *Martin* v. *Struthers*, 319 U. S. 141; *Murdock* v. *Pennsylvania*, 319 U. S. 105. It would seem that if this activity is deserving of the protection of the First Amendment against censorship, unessential regulation, and prohibition, it is likewise and by the same token entitled to

protection against taxation on the pretext that it is a "commercial" enterprise.

Endangering of the people and the entire public press, upon which the public depends for news and other information procurable at low cost (made possible largely by commercial advertising that supports the newspapers), through the doctrine announced in the *Chrestensen* case, has been heretofore discussed. That argument is not repeated here but this Court, before passing on the questions presented, is requested to review such arguments.[9]

If this Court sustains a tax upon the distribution for profit of literature containing information and opinion, or newspapers containing a large percentage of advertising, it will thereby approve a principle which permits prohibition or censorship of such publications and their distribution. For, once a tax in any amount is sustained the courts are powerless to intervene to protect against an increase thereof to a point of destruction or prohibition of the object affected thereby.[10]

Only recently has the strange doctrine been announced that the test of the application of the First Amendment will be whether or not the activity seeking the protection of the Constitution is "commercial". Already the results of this doctrine have caused confusion. The basis for the now vacated decision of this Court in *Jones* v. *Opelika*, 316 U. S. 584, was ". . . because we view these sales as partaking more of commercial than religious or educational transactions". Therefore, this Court originally did "find the ordinances, as here presented, valid". Then a few months later the majority of the Court changed its view of the *same transactions* and held that they were

[9] See Appellant's brief in *Jamison* v. *Texas*, No. 558, October Term 1942, pages 28-31. See also appellant's *jurisdictional statement*, this case, page 15.

[10] *Veazie Bank* v. *Fenno*, 8 Wall. 533, 548; *McCray* v. *United States*, 195 U. S. 27, 59-60; *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 167; *Magnano Co.* v. *Hamilton*, 292 U. S. 40, 45.

not commercial but were an "age-old form of missionary evangelism".[11] That reversal is significant in that it was accomplished not by a different constitutional construction, but merely by an adjusted view of the activity of Jehovah's witnesses. In reversing itself, the Court admits that the distinction between commercial and non-commercial activity may at times be "difficult".

Obviously, adherence to the *Chrestensen* rule will reduce the solid and lasting protection afforded by the Constitution to the *Press*, to the mere passing notions of members of the judiciary. Judges would be compelled to indulge in sophistry and make hairline distinctions as to what is "commercial" in "difficult" situations. At best, the application of the doctrine would only result in drawing arbitrary lines of distinction without foundation in law, dependent only upon social, economic or political views of the majority of jurists in power. The fine distinction made between the activity in *Jamison* v. *Texas*, 318 U. S. 413, and in *Valentine* v. *Chrestensen*, 316 U. S. 52, is an example of such a distinction WITHOUT A DIFFERENCE so far as the Constitution is concerned.

As Chief Justice Taft put it,[12] "this is a government of laws and not of men." The same idea was expressed by Justice Story:[13]

> "What is to become of constitutions of government if they are to rest, not upon the plain import of their words, but upon conjectural enlargements and restrictions to suit the temporary passions and interests of the day. . . . They are not to be frittered away to please the demagogues of the day. They are not to be violated to gratify the ambition of political leaders; they are to speak the same voice now and forever."

Unless the constitutional rights of the people are to be

[11] *Murdock* v. *Pennsylvania*, 319 U. S. 105, at page 109.
[12] *Truax* v. *Corrigan*, 257 U. S. 312, 332.
[13] Story, *Commentaries on the Constitution*, Vol. 2, p. 653.

tossed around the judicial arena according to the rule of thumb of the judges, the unfortunate distinction between the standing of commercial and non-commercial publications under the Constitution must be abrogated.

Exquisitely appropriate are the words of the eminent law writer Vattel:[14]

> "The constitution of a State and its laws are the foundations of public peace and the firm support of political authority, and the security for the liberty of citizens. But this constitution is a mere dead letter, and the best laws are useless if they be not sacredly observed. It is therefore the duty of the nation to be ever on the watch that the laws be equally respected both by those who govern and by the people who are to be ruled by them. To attack the constitution of the State, and to violate its laws is a capital crime against society; and if the persons who are guilty of it are those in authority, they add to this crime a perfidious abuse of the power confided to them. A Nation must uniformly put down such violations with all the vigor and vigilance which the importance of the case demands. . . .
>
> "The constitution and laws of a State are rarely attacked from the front; it is against secret and gradual attacks that a Nation must chiefly guard. Sudden revolutions strike the imaginations of men; their history is written, and their secret sources are made known; but changes are overlooked when they come about insensibly by a series of steps which are scarcely noted. . . ."

It is singular that the distinction made by this Court in the *Chrestensen* case is made without citation of authority,

[14] E. de Vattel, *The Law of Nations, or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns.* (Trans. from edition of 1758 by Charles G. Fenwick in "The Classics of International Law", Washington, 1916).

or justification in reason. The arbitrary discrimination between the two types of publications in that opinion completely ignores the real meaning and purpose of the guaranty of a free press. The value of "freedom of the press" does not lie exclusively in freedom to print and to circulate. Exercise of those rights is only a means to an end—the ultimate object of the constitutional guaranty. The people of the United States secured "freedom of the press" because they desired FREEDOM TO READ.

Similarly, they secured "freedom of speech" because they wanted FREEDOM TO LISTEN.[13]

The founding fathers wisely felt that true democratic government rested upon the capacity for self-government which, in turn, is founded upon the unstinted diffusion of knowledge. Said Thomas Jefferson: "Enlighten the people generally and tyranny and oppressions of the body and mind will vanish like spirits at the dawn of day." James Madison, one of the Fathers of the Constitution, stated it even more bluntly: "A popular government, without popular information, or the means of acquiring it, is but a prologue to a farce or a tragedy." More recently, this Court, in *Martin* v. *Struthers*, 319 U. S. 141, announced a similar view:

> "The authors of the first amendment knew that novel and unconventional ideas might disturb the complacent, but they chose to encourage a freedom which they believed essential if vigorous enlightenment was ever to triumph over slothful ignorance. *This freedom embraces the right to distribute literature,* and *necessarily protects the right to receive it.*" [Italics added]

Thus, the freedoms in the First Amendment cannot be

[13] This Court's opinion in *National Broadcasting Co., Inc., et al.* v. *United States et al.*, 319 U. S. 190, loosed a flood of comment in Congress on the *Freedom to Listen*. See 89 Cong. Rec. No. 167, pp. A5027, A5029. Analysis of the subject made by James L. Fly, chairman of the Federal Communications Commission, is particularly enlightening: 89 Cong. Rec. No. 164, p. A4915. See also 89 Cong. Rec. No. 164, p. A4991.

measured by the character of the initiating parties involved. In each case the real test is the consideration and determination as to whether or not the *article* or *service* delivered to the people of the United States falls into any one of the categories specified for protection by the Constitution. If the *article* or *service* is found to be one of those things which the sovereign PEOPLE have secured unto themselves by the First Amendment, then such *article* or *service* is beyond the reach of the federal or state government's control up to the point of abuse of the right where the police power necessitates interference.

When this common-sense view is taken of the First Amendment, and aside from all the many supporting precedents announced by this Court, it will be found that regardless of the fact that many presses or, as the matter actually is, *most* presses turn out the printed page primarily for pecuniary gain that will be derived through its circulation, still the PEOPLE are protected simultaneously in their right to *receive* the benefits of the printed page—entirely apart from benefit accruing to distributors, and apart from the distributors' claim for protection.

Suppose that appellant here were motivated solely by the most selfish of desires for personal enrichment in distributing the book *Children* to the people. Assume further that the book contained information of the most vital and important character for the public benefit. Could it possibly be contended that the municipality has the right to deprive the people of their right to *receive* the information in that book, solely because the distributor was making a profit from the distribution or was "selling" the book for *commercial* purposes or in a *commercial* manner? If a householder desires information contained in a book or other publication, what difference could it possibly make to him that the person bringing it to him is inspired by "commercial" rather than "religious" motives? As far as the constitutionally protected right of the public is concerned, what

difference does it make that the mode of distribution ("sale") partakes "more of commercial than religious or educational transactions"?

Consider also the matter of commercial advertising. From the viewpoint of the people's *Freedom to Read*, a commercial dodger or handbill advertising the display of a navy submarine might be of great interest to many persons. It might have more real educational value to the passing pedestrian and to the welfare of the Government than the tendered leaflets of the Young Communists League or the 'commercially tainted' handbill of the Friends Lincoln Brigade approved by this Court in the companion case from Los Angeles decided with *Schneider* v. *State*, supra.[16] A circular announcing a special sale of two-pants suits might contain information more useful to recipients than a paper advocating establishment of a so-called "Christian Front".

In any event, who is to determine what the people have a right to read and what they may not read? Certainly the legislature does not have the right to make the determination;[17] nor do the courts have that prerogative. It appears, however, at the present time that the Supreme Court of the United States has taken over this "difficult task", as in *Valentine* v. *Chrestensen*, supra; and *Jamison* v. *Texas*, supra. It is high time that this Court admit its incompetence to decide for *the people* the very thing the sovereign PEOPLE reserved to themselves in the First Amendment.

The Constitution is a written compact in which "the sovereignty of the people and the responsibility of their

[16] "On the hand-bill were the words 'Admission 25c and 50c'. The Superior Court adverted to these and said: 'Whatever traffic in ideas the Friends Lincoln Brigade may have planned for the meeting, the *cards themselves seem to fall within the classification of commercial advertising* rather than the expression of one's views.' [Italics added]" ROBERTS, *J.*, *Schneider* v. *State*, 308 U. S. 147, 155, note 3.

[17] *Taylor* v. *Mississippi*, 319 U. S. 583; *Bridges* v. *California*, 314 U. S. 252; *De Jonge* v. *Oregon*, 299 U. S. 353; *Herndon* v. *Lowry*, 301 U. S. 242; *Near* v. *Minnesota*, 283 U. S. 697; *Schenck* v. *United States*, 249 U. S. 47; *Stromberg* v. *California*, 283 U. S. 359; *Thornhill* v. *Alabama*, 310 U. S. 88.

servants are principles fundamentally and unequivocally established; in which the powers of the several branches of government are defined and the excess of them, as well in the legislature as in the other branches, finds limits, which cannot be trangressed without offending against the greater power from whom all authority, among us, is derived; to wit, the people."[18]

This controversy affords an appropriate occasion for this Court to declare that freedom of speech and freedom of the press belong to the sovereign people, FREE from any burdens or previous restraints such as censorship or taxation; that *the people* have a constitutional right to hear and read what they please whether it be commercial or non-commercial; that both the LEGISLATURE and the JUDICIARY are without authority outside the police power to make a choice for *the people* as to what they have the right to read.

Epitome

Recognizing the gravity of world conditions that now face mankind, the President of the United States recently made this timely observation:

> "In these days of struggle which try every soul and every institution and every tradition, we are all in desperate need of a light that is not of man. May God grant that the church will not fail in providing the light in our spiritual darkness. For if we lack spiritual guidance for our immediate problems and set our feet in consequence upon obscure ways, our children shall wander for long years in a moral wilderness." [19]

[18] Tucker's *Blackstone* (ed. 1803), Vol. 1, p. 88, note.

[19] Associated Press dispatch of December 15, 1943, quoting President Roosevelt's reply to an inquiry made by the bishop of the Episcopal Diocese of Connecticut relative to what the president believed to be the function of the Christian church in the world today.

Appellant, a Christian minister, declared that his work was just as expressed by Jehovah's prophet Isaiah, "... the LORD hath anointed me to preach good tidings unto the meek; he hath sent me to bind up the brokenhearted, to proclaim liberty to the captives, and the opening of the prison to them that are bound; to proclaim the acceptable year of the LORD, and the day of vengeance of our God; to comfort all that mourn."[20] Regardless of the apparent unconcern of the courts below for the public importance of this activity, the fact is that appellant was engaged in the performance of a duty unequaled in its necessity for the welfare of the people of the Town of McCormick, South Carolina. In distributing to the people literature setting forth the gospel message, appellant was no more "selling books" than priests would admit that they "sell masses". A flat tax upon the exercise of appellant's activity violates the Constitution and the conviction cannot stand.

In *Valentine* v. *Chrestensen*, supra, this Court vigorously condemned the employment of a subterfuge to bring the handbill within the protection of the First Amendment. Here, and for the same reason, it should publicly discountenance the manifest subterfuge devised by the court below to deprive appellant of his constitutional right to worship Almighty God Jehovah by distributing literature explaining the Bible, and to *sidestep* the mandate of this Court in *Murdock* cases. But should the subterfuge of the court below be accepted here in good faith, and appellant be regarded as a resident *commercial* "book agent", nevertheless the device chosen and used to throttle his activity fails against the protection afforded *all publications*, commercial and non-commercial, under the First and Fourteenth Amendments.

In these days of unrest that "try men's souls", the grave responsibility of this Court to "the people of the United

[20] Isaiah 61: 1, 2; see also Luke 4: 18, 19, where Jesus quoted Isaiah's prophecy as His commission.

States" to defend and protect the rights and liberties of *the people* is no light burden and is concededly heavier than in any other time in the history of the Court. Despite the declarations to the contrary by the courts below, the conviction of appellant challenges the most cherished rights of Americans. The high duty of the Court under these circumstances is well stated by the late Justice Cardozo:[21]

> "The utility of an external power restraining the legislative judgment is not to be measured by counting the occasions of its exercise. The great ideals of liberty and equality are preserved against the assaults of opportunism, the expediency of the passing hour, the erosion of small encroachments, the scorn and derision of those who have no patience with general principles, by enshrining them in constitutions, and consecrating to the task of their protection a body of defenders. By conscious or subconscious influence, the presence of this restraining power, aloof in the background, but none the less always in reserve, tends to stabilize and rationalize the legislative judgment, to infuse it with the glow of principle, to hold the standard aloft and visible for those who must run the race and keep the faith.
>
> "Great maxims, if they may be violated with impunity, are honored often with lip-service, which passes easily into irreverence. The restraining power of the judiciary does not manifest its chief worth in the few cases in which the legislature has gone beyond the lines that mark the limits of discretion. Rather shall we find its chief worth in making vocal and audible the ideals that might otherwise be silenced, in giving them continuity of life and of expression, in guiding and

[21] Benjamin N. Cardozo, *The Nature of the Judicial Process* (New Haven, 1921), 92-94.

directing choice within the limits where choice ranges. This function should preserve to the courts the power that now belongs to them."

Conclusion

The judgment of the court below should be reversed, and appellant discharged, with costs.

Respectfully submitted,

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